IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

WEDNESDAY, THE 7TH MARCH 2007 / 16TH PHALGUNA 1928

CRL.A.No. 1162 of 2002()

C.C.821/1995 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-I, KOZHIKODE.
CRL.A.NO.271/1997 OF SESSIONS JUDGE, KOZHIKODE.

APPELLANT: COMPLAINANT

ROY MATHEW, S/O. MATHEW,
SESHODHARANI CROSS ROAD, MALAPARAMBA P.O.,
KOZHIKODE.

BY ADV. SRI.P.RAVINDRA BABU

RESPONDENTS: ACCUSED & STATE

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1. K.P.GANGADHARAN NAMBIAR,
SUSNITHA, CHAMAKUNNUMAL P.O., PERAMBRA.

2. STATE OF KERALA, REP.BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MUHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No. 1162 of 2002

Dated this the 7th March, 2007.

J U D G M E N T

The complainant was before the Judicial First Class Magistrate Court-I, Kozhikode, with a complaint under Section 138 of the Negotiable Instruments Act, in short 'the Act', against the first respondent, accused, as Ext.P1 cheque issued by the first respondent had bounced back, for want of sufficient funds in the account of the first respondent. Despite the demand of the amount in Ext.P1 cheque, and also intimating the dishonour of the cheque, the first respondent, accused, failed to pay the amount. Hence, a criminal complaint was preferred.

2. Two witnesses were examined and six documents were marked on the part of the appellant. The lower court accepted the contentions and found the first respondent guilty, and, therefore, convicted and sentenced him, under Section 138 of the Negotiable Instruments Act, to undergo simple imprisonment for a period of six months. The conviction and sentence were challenged in Crl.A.No.271

of 1997, on the file of the Sessions Court, Kozhikode. The Appellate Court found that though an amount of Rs.50,000/= is written as cheque amount in Ext.P1 cheque, first respondent admitted as having received only an amount of Rs.25,000/=, and he has paid back the amount of Rs.10,000/= from the principal debt amount. Therefore, an amount of Rs.15,000/= alone was due to the appellant. The interest was also regularly paid. A blank cheque was issued at the time of borrowing the amount of Rs.25,000/=. The court also found that the colour of the ink with which signature of the first respondent was affixed was different than the colour of the ink in the writings of the date, the name of the payee, and the amount, both in words and figures. The person who affixed the signature in Ext.P1 cheque did not write those details in Ext.P1 cheque. As the first respondent was a headmaster, there is no need for him to write the cheque through some one. Therefore, as the complainant, being a money lender, the lower appellate court found, on facts, that the complaint is not sustainable, and, therefore, dismissed the same, and acquitted the accused. This appeal is thus filed, after obtaining leave, challenging the acquittal of the accused.

3. In **Lillykutty v. Lawrence** *(2003 (3) KLT 721)*, a Division Bench of this Court has considered that unless the contrary is proved, as per the principle of preponderance of probabilities, the person holding a cheque in due course, is entitled to present the same, after filling up the same, with the required details. However, the drawer of the cheque may contradict the contents in the cheque so produced for clearance. The different colour of the ink in the signature, as well as the other details entered in the cheque, will not be a ground to hold that it is a material alteration. Therefore, the learned Sessions Judge was not correct in holding that the first respondent, being a headmaster, it was not necessary for him to write Ext.P1 cheque through the help of others.

4. In **I.C.D.S Ltd. v. Beena Shabeer** *(2002 (3) KLT 218(SC),* the issuance of a cheque as security for an amount borrowed has come up for consideration, and it was found that the cheque issued as security is also coming within the 'other liability', as contained under Section 138 of the Act.

5. Finding on facts, the court held that a blank cheque was issued by the first respondent, at the time of borrowing the amount of Rs.25,000/=. He had paid back the interest on the principal

amount, and also an amount of Rs.10,000/=. Therefore, the amount of Rs.50,000/= as recorded in Ext.P1 is not the entitled amount for the appellant, and only an amount of Rs.15,000/=, is to be paid by the first respondent. But except this statement, as recorded in Ext.P5 reply notice, no evidence had been adduced. Therefore, unless, the presumption available under Sections 118 and 139 of the Act are rebutted, the first respondent, accused, is not entitled to plea that the presumption is rebutted, and the amount in Ext.P1 cheque is not to be paid to the appellant.

6. In view of the above facts situation, though the appellant is a money lender, and he obtained the blank cheque, at the time of issuance of the amount, it is the legal requirement that the first respondent, accused, should adduce evidence to rebut the presumption, and as that having been not done, the contentions of the first respondent, accused, cannot be accepted in toto. However, in the circumstances of the case, I am of the view that an opportunity be given to the parties to adduce further evidence, so that their contentions could be substantiated.

7. Therefore, I set aside the impugned judgment of the Sessions Court, in Crl.A.No.271/97, as well as the conviction and sentence passed by the Magistrate Court. C.C.No.821/1995 is restored to the case to the file of the Judicial First Class Magistrate Court-I, Kozhikode. The case is remitted to the Magistrate court for fresh disposal, according to law.

8. The complainant shall appear before the court below on 12.4.2007.

9. Though the service is complete in respect of the first respondent, accused, there is no representation before this Court, when the appeal was taken up. Therefore, the lower court shall get the presence of the first respondent, accused, and shall dispose of the matter, within four months from the date of appearance/production of the accused, before that court.

Criminal Appeal is allowed as above.

J.M. JAMES,
JUDGE

nj.

J.M. JAMES, J.

Criminal Appeal No. 1162 of 2002

J U D G M E N T

Dated: 7th March, 2007.